IN THE

Supreme Court of the United States

October Term, 1942.

No. 849

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.,
Petitioners,

versus

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR (C. C. HUFFMAN, ADMINISTRATOR, ETC., SUBSTITUTED IN THE PLACE AND STEAD OF PHILIP J. CHARLET),
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORIGINAL BRIEF ON BEHALF OF RESPONDENT.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORIGINAL BRIEF ON BEHALF OF RESPONDENT.

MAY IT PLEASE THE COURT:

The petitioners seek a declaratory judgment pronouncing unconstitutional the Louisiana Unemployment Compensation Law (Act 97 of 1936, as amended by Act 164 of 1938, Act 16 of the Extraordinary Session of 1940, and Act 11 of the Regular Session of 1940) to the extent that it re-

quires them to pay to the State of Louisiana contributions measured by the wages paid by them to their employees while engaged in dredging operations on the navigable waters of the United States within the State of Louisiana The sole basis of attack is that the State of Louisiana in enacting said statute invaded a field of legislation reserved exclusively to the United States by Article I, Section 8, and Article III, Section 2, of the Constitution of the United States.

The respondent, who is the Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana, the official charged with the enforcement of the statute, contends that the Louisiana statute levies a nondiscriminatory excise tax based upon the exercise of the right or privilege of employing individuals measured by the wages paid, the right to levy which existed prior to the adoption of the Constitution and which was reserved to the states by the Constitution; that the statute under attack in no way affects the rights, duties or obligations of the parties *inter se* to a maritime contract and in no way interferes with or contravenes the maritime law or affects the uniformity of that law or contravenes the purpose and intent of any Act of Congress.

These defenses were maintained by the District Court (*Great Lakes Dredge & Dock Co. v. Charlet*, 43 F. Supp. 981) in dismissing petitioners' suit. The Circuit Court of Appeals for the Fifth Circuit (Id. R. 54) affirmed the decision of the District Court. Similar defenses prevailed in six cases decided by the Court of Appeals of the

State of New York. *Claim of Casseratakis, et al.*, 44 N. E. 2d 391.

I.

JURISDICTION.

In granting certiorari, the Court requested counsel "to discuss in their briefs and on oral argument the question whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

The Federal Declaratory Judgment Act (28 U. S. C. A., Sec. 400) was originally enacted in 1934 and contained no provision denying jurisdiction to federal courts to entertain suits involving taxing statutes. In 1935, the Act was amended so as to provide that the act could not be invoked with respect to federal taxes. In 1937, the Congress passed the Johnson Act (28 U. S. C. A., Sec. 41(1)) which provides:

> "No district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Section 18 of Article 10 of the Constitution of Louisiana of 1921, the present Constitution, provides:

> "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for

> a complete and adequate remedy for the prompt recovery by any taxpayer of any illegal tax paid by him."

Under authority of that provision of the State Constitution, the Legislature of Louisiana enacted Act 330 of 1938, amending and re-enacting Act 16 (2nd. E. S.) of 1934, as amended by Act 23 (2nd. E. S.) of 1935, printed in full as an appendix to this brief, which denies jurisdiction to any state court to restrain the collection of any tax imposed by the State and provides a remedy for any taxpayer who has paid any tax, the whole or any part of which has been declared illegal by any court of competent jurisdiction, to secure reimbursement. The statute provides that the taxpayer shall pay the tax under protest and give the tax collector notice of his intention to sue for the recovery of the tax, whereupon the tax collector shall segregate the amount and hold it for a period of thirty days. If the taxpayer files his suit within the thirty day period, the tax collector must hold the amount until the suit is finally decided. The sole defendant in the suit is the tax collector, and the action may be brought in either state or federal courts.

The remedy afforded by this statute appears to meet fully the condition prescribed by the Johnson Act, and it remains to determine if Sec. 41(1) of the Johnson Act should be read into the Declaratory Judgment Act. Judge Clancy of the District Court for the Southern District of New York, in the case of *Collier Advertising Service, Inc. v. City of New York*, 32 F. Supp. 870, says that it should because (p. 872):

> "It would be disingenuous to deny that a declaration of the plaintiff's claimed rights in this action

> would secure any other result than to enjoin, suspend and restrain the operation of the Sales Tax Law upon its business. Any other holding would substantially nullify the Johnson Act."

On the other hand, Judge Kennedy of the District Court of Wyoming, in the case of *Morrison-Knudsen Co., Inc. v. State Board of Equalization of Wyoming*, 35 F. Supp. 553, expressed a contrary view, holding that the Declaratory Judgment Act provided an exception only in cases involving federal taxes and that the Johnson Act applies only to suits where injunctive relief is sought. He asserts that his view is supported not only by the history of the legislation but also by the fundamental rule of construction that unambiguous statutes should be construed as they read.

The Johnson Act is discussed in the case of *City of El Paso* (5 C. C. A.), 100 F. (2d) 501, 502-503, where it is said that this act emphasizes "the increasing disinclination of federal authority to interfere in State matters until State remedies have been exhausted" and that:

> "This disinclination is founded in comity, rather than on a want of power either as a federal court or as a court of equity. It looks to a maintenance of the smooth and satisfactory operation of our dual form of government. Compare Pennsylvania v. Williams, 294 U. S. 176, 177, 55 S. Ct. 380, 79 L. Ed. 841, 96 A. L. R. 1166."

The petitioners in this case have not invoked the remedies provided by the state remedial statute above referred to, nor have they attacked the Louisiana Unemployment Compensation Law, constitutionally or otherwise, in the courts of Louisiana.

Tax matters as proper subjects of actions for declaratory judgments under declaratory judgment statutes of the several states, as well as under the Federal Declaratory Judgment Act, are discussed copiously in the Annotation in 132 A. L. R., beginning at page 1108. Federal cases on the subject are cited on pages 1111, 1113, 1114, 1115, 1120 and 1122, but only the two District Court cases above quoted from appear to deal directly with the question whether or not the Johnson Act should be read into the Federal Declaratory Judgment Act.

Attention is also called to Section 13(g) of the Louisiana Unemployment Compensation Law, which appears to provide an additional remedy for the recovery of contributions erroneously paid by employers. The Clerk has been furnished with printed copies of that statute for the convenience of the Court.

II.

THE WORKMEN'S COMPENSATION ACTS ARE IRRELEVANT TO THE ISSUE.

The petitioners rely upon the decisions holding workmen's compensation acts unconstitutional insofar as they pretend to apply to maritime contracts, but these decisions are inapplicable here for the reason that they, unlike the unemployment compensation statutes, change the legal rights and obligations of the parties to a maritime contract of employment. They alter, and in some cases actually set aside, the common law rules governing the rights and

duties of employer and employee in accident cases and fix a definite amount of compensation which the employer must pay to the employee in case of disability and to his dependents in case of death in lieu of the common law liability limited and confined to cases of negligence. They permit an employee to recover in spite of his negligence, but he recovers less than he can in a common law action, and they relieve the employee of proving negligence and the amount of damages, giving him a certain and speedy remedy to obtain a fixed and moderate compensation for his injuries. In short, they set aside one system of rules and substitute another system in its place. *New York Central R. R. Co. v. White,* 243 U. S. 188, 37 Sp. Ct. 247. A typical case is that of *Washington v. Dawson,* 264 U. S. 219, 44 Sp. Ct. 302, cited and stressed by the appellants in their brief. There the Workmen's Compensation Act of the State of Washington was before the Court and contained the following provisions:

> "Section 7673. Declaration of police power. The common law system governing *the remedy of workmen against employers* for injuries received in hazardous work is inconsistent with modern industrial conditions * * * the State of Washington, therefore, exercising herein its police and sovereign power, declares that all *phases of the premises are withdrawn from private controversy * * * and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.*" (Emphasis ours.)

> "Section 7679. Schedule of awards. Each workman who shall be injured in the course of his em-

ployment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, *such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever* * * *." (Emphasis ours.)

The Court held that the act was unconstitutional under the rule laid down in the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sp. Ct. 524, because the statute, as in the case of other workmen's compensation laws, sought to fix the rights and liabilities of the parties in cases of maritime injuries, and, therefore, involved matters within the admiralty jurisdiction. The decision rested entirely upon the fact that the Washington statute withdrew a right of action from the admiralty jurisdiction.

In the matter of *Doey v. Howland Co.*, 224 N. Y. 36, 120 N. E. 53, the court said:

"An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Am. Cas. 1916 B 158. The contract of employment, by virtue of the statute, contains an implied provision, that *the employer, if the employee be injured, will pay to him* a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services

rendered in the course of the employment." (Emphasis ours.)

Having shown that the workmen's compensation statutes materially altered the rights and obligation of *the parties themselves* to a maritime contract, which the Supreme Court held the states had no power to do, let us examine the Louisiana Unemployment Compensation Law and compare its pertinent provisions with those of the workmen's compensation statutes in the light of what has been said above.

This statute establishes an unemployment insurance fund in the nature of a single reserve out of which benefits are paid for a limited period of time to those who by reason of economic maladjustment or other causes are temporarily unemployed. The fund is created by contributions paid by employers subject to the Act (Section 18(f))* and fixed at 2.7% of the wages paid to employees (Section 6(b)). Certain employers are exempt from its operation (Section 18(g) (6)). Benefits are paid out of the fund to unemployed persons who register as such with the State Employment Office and who are ready, able and willing to work but who are unable to find suitable employment and have, during a base period, been paid wages for insured work equal to not less than twenty times the weekly benefit amount (Section 3). The weekly benefit amount is 50% of the full time weekly wage, but cannot exceed $18.00 per week and cannot be less than $3.00 per week (Section 2(b) (1)). Free employment offices are provided in such number as the Administrator finds necessary (Section 11). Before unemployment compensation benefits commence, the

* Section references to Act 97 of 1936, as amended.

statute provides for a waiting period of two weeks, and an employee who lost his job through misconduct can be made to wait for an additional six weeks (Section 4(b)). Contributions collected under the act are pooled in the Unemployment Compensation Fund (Section 8 (a)), and monies in the fund are deposited in the Unemployment Trust Fund of the United States so long as that fund exists (Section 8(b)). As the money is needed for benefit payments the Administrator is authorized to make requisition for such amounts as may be necessary (Section 8(c)).

It should be noted that, unlike workmen's compensation statutes, the Louisiana Unemployment Compensation Law is not in lieu of any preexisting statutory or common law rights or obligations and neither enlarges nor limits *inter se* the rights of the parties to any contract of employment, which remains entirely unaffected. That view was adopted by the Circuit Court of Montgomery County, Alabama, in the case of *Beeland Wholesale Company v. Kaufman*, (Vol. 1, Commerce Clearing House Unemployment Insurance Service, Alabama, Sec. 8023, p. 5516, affirmed 234 Ala. 249, 174 So. 516), in which the constitutionality of the Alabama Unemployment Compensation Law was at issue. There the Court said:

> "The obligation of a contract is that duty of performing the contract according to its terms and intent, which the law recognizes and enforces. *The law here under consideration does not provide for any deviation from the terms of the contract* by increasing its burdens or decreasing its efficiency, or by hastening or postponing the time of its performance. *Neither party is absolved from performing the contract. The remedy for the enforcement of*

> *the contract is not cut off.* The Court is of the opinion that the Act leaves the parties at liberty to make any terms they see fit, *and in no way affects the obligations of the contract.*" (Emphasis ours.)

In 4 *Fordham Law Review,* page 496, it is said:

> "The unemployment acts make no similar substitution (substitution for the rights or duties of an employer) since they confer no benefit on the employer and remove no existing liability."

Attention is also called to the case of *Globe Grain & Milling Co. v. Industrial Commission of Utah and Albert E. Thomas,* 91 P. 2d 512, (amended on rehearing, 97 P. 2d 582), in which the Supreme Court of Utah held that the contract of employment involved in that suit was not impaired by the Utah Unemployment Compensation Act within the meaning of Article I, Sec. 18, of the State Constitution and Article I, Section 10, of the Federal Constitution. The Court said at page 516:

> "* * * no question of the impairment of contract is involved. The contract is not impaired; it goes on as before. The relationship created by the contract is taxed * * *."

It appears to be crystal clear that the Louisiana Unemployment Compensation Law in no way changes or affects any legal rights or obligations *between the employer and the employee.* It simply imposes on employers an excise tax made payable to the State. No remedy is given by it to the employee against the employer or in favor of the employer and against the employee. The sole right conferred is one in favor of the employee *against the State;*

and his right comes into existence only *when he becomes unemployed and when the relation of employer and employee has ceased to exist.* The act does not operate upon the contract of employment, but recognizes the relation of employer and employee only to the extent of determining whether an employer must pay a tax for its privilege of having persons in his employ within the territorial limits of the State of Louisiana and for the additional purpose of determining whether a claimant is entitled to unemployment benefits, because he earned wages under such a contract.

III.

THE TAX IMPOSED BY THE LOUISIANA UNEMPLOYMENT COMPENSATION LAW IS AN EXCISE.

That the contributions required by the Louisiana Unemployment Compensation Act are excises levied upon the exercise of the right and privilege of employing persons can scarcely be denied, and any doubt which may have previously existed in that respect has been dispelled by the decisions of the Supreme Court in the cases of *Steward Machine Co. v. Davis,* 301 U. S. 548, 578-583, 57 Sp. Ct. 883, and *Carmichael v. Southern Coal & Coke Co.,* 301 U. S. 495, 508, 509, 57 Sp. Ct. 868, the first involving a "payroll" tax levied by Section 901 of the Social Security Act, Public No. 271, 74th Congress, now Section 1600 of the Internal Revenue Code, and the latter dealing with a similar tax imposed by the Unemployment Compensation Act of the State of Alabama, Act 447 of 1935; Alabama Code of 1928 (1936 Cum. Supp.), Section 4. See also *Beeland Wholesale*

Co. v. Kaufman, 174 So. 516, 234 Ala. 249. The provisions of the Alabama Act are basically the same as those of the Louisiana Statute and, if the one levies an excise tax, the other likewise does so. In the later case of *Helvering v. Davis*, 301 U. S. 619, 57 Sp. Ct. 904, involving the validity of Section 804 of the Social Security Act, now Section 1410 of the Internal Revenue Code, which levied a tax on employers measured by the wages they paid to their employees, the Supreme Court said:

> "The tax upon employers is a valid excise or duty upon the relation of employment." (p. 645.)

It is needless to say that a statute need not designate an excise as such and that its character as an excise is not affected even if the statute gives it another name. *Barwise v. Sheppard*, 299 U. S. 33, 36, 57 Sp. Ct. 70; *Carmichael v. Southern Coal & Coke Co., supra*, p. 508; *Educational Films Corp. v. Ward*, 282 U. S. 379, 387, 51 Sp. Ct. 170.

IV.

THE RIGHT OF A STATE TO IMPOSE EXCISE TAXES INHERES IN THE STATE, AND IS A POWER RESERVED TO THE STATES BY THE FEDERAL CONSTITUTION.

The State of Louisiana's power to impose an excise on employment originated before the adoption of the Federal Constitution and was reserved to it by that instrument as an attribute of State sovereignty. Having shown that the validity of payroll taxes has been recognized by the

highest court of the land, the historical background of such excises, as related by Mr. Justice Cardozo in *Steward Machine Co. v. Davis*, 301 U. S. 548, 579-580, 57 Sp. Ct. 883, is interesting and important. There the learned jurist said:

> "As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. *Cf. Pensacola Telephone Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9; *in re Debs*, 158 U. S. 564, 591; *South Carolina v. United States*, 199 U. S. 437, 448, 449. But in truth other excises *were* known, and known since early times. Thus in 1695 (6 & 7 Wm. III, c. 6), Parliament passed an act which granted 'to His Majesty certain Rates and Duties upon Marriage, Births and Burials,' all for the purpose of 'carrying on the War against France with Vigour.' See *Opinion of the Justices*, 196 Mass. 602, 609. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, Parliament laid upon employers an annual 'duty' of 21 shillings for 'every male Servant' employed in stated forms of work. Revenue Act of 1777, 17 George III, c. 39. The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. *Davis v. Boston & Main R. R. Co. supra.* It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever may be

thought of its validity, is inapplicable to a statute of Virginia passed in 1780. There a tax of three pounds, six shillings and eight pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for 'every white servant whatsoever, except apprentices under the age of twenty-one years.' 10 Hening's Statutes of Virginia, P. 244. Our colonial forbears knew more about ways of taxing than some of their descendants seems to be willing to concede." (Emphasis ours.)

And in *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 508, 57 Sp. Ct. 868, Mr. Justice Stone said:

"Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied upon property or its use, but they may likewise be laid on the exercise of personal rights and privileges. As has been pointed out in the opinion in the Chas. C. Stewart Machine Co. case, such levies, including taxes on the exercise of the right to employ or to be employed *were known to England and the Colonies before the adoption of the constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the States at the time of the adoption of the Constitution and which was reserved to them by that instrument.*" (Emphasis ours.)

How could language be used more suggestive that there may be no inhibitions upon the power of the several States to levy excise taxes upon the right to employ? Of course, the taxing power of a State must be exercised within the limitations imposed by the Fourteenth Amendment to the United States Constitution but, except as limited by that

amendment, the power of a State to tax those within its boundaries appears to be unrestricted. On that subject Mr. Justice Stone said in *Lawrence v. State Tax Commission*, 286 U. S. 276, 279-280, 52 Sp. Ct. 556:

> "The Federal Constitution imposes on the States no particular modes of taxation and apart from the specific grant to the Federal Government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the State unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the State or *on privileges enjoyed there*, and is not so palpably arbitrary or unreasonable as to infringe the 14th Amendment." (Emphasis ours.)

And what is there said applies in spite of the fact that the petitioners in the case at bar are engaged in a business which in some respects is subject exclusively to regulation by Congress, as indicated in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, in which Chief Justice Marshall, speaking for the Court, said:

> "The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and *has never been understood to interfere with the exercise of the same power by the states;* and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms of their nature. Although many of the powers formerly exercised by the states, are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The

power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. *This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do.* Congress is not empowered to tax for those purposes which are within the exclusive province of the states. *When, then, each government exercises the power of taxation, neither is exercising the power of the other.* But, when a state proceeds to regulate with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. *There is no analogy, then, between the power of taxation and the power of regulating commerce* * * *." (pp. 199, 200.)

"In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive

and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. *But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce.* (pp. 201, 202.)

"The right to regulate commerce, even by the imposition of duties was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

"These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purpose to restrain." (pp. 202, 203.) (Emphasis ours.)

It must be conceded by petitioners that the power of Congress to regulate and control maritime matters is not an express constitutional grant of power but one implied from the general grant by Article III, Section 2, of the United States Constitution to the federal judiciary of jurisdiction in admiralty and maritime cases. That being true, it follows that the constitutional inhibition there implied cannot be extended any further in maritime matters than can the inhibition on the power of the states provided

expressly by the commerce clause of the Federal Constitution in matters of interstate commerce. It cannot be denied that a State may, without offending the commerce clause of the Constitution, impose excises upon corporations engaged in interstate commerce provided, of course, the tax is not discriminatory, and is not so burdensome as to constitute a direct and unreasonable interference with such commerce. The Court said that in the case of *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 294, 42 Sp. Ct. 305:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases) on the other hand, it is settled that a state excise tax, which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

The petitioners do not pretend that the excise levied by the Louisiana statute under attack is discriminatory or that it interferes unreasonably or onerously with their interstate or maritime business, but they contend solely that the statute prevents the uniform operation of the maritime law, about which more will be said later in this brief. It is undeniable that a state may tax the instruments used in interstate commerce without offending the commerce clause of the Constitution *(Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sp. Ct. 961), even where the nature of the commerce is maritime *(Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 305, 25 Sp. Ct. 686), and the cases where such taxes have been invalidated by the courts are limited to situations where a

number of states would have an equal right and opportunity to impose similar taxes with the result that there would be a pyramiding of tax burdens which would destroy or *seriously* impair such commerce *(Western Live Stock Co. v. Bureau,* 303 U. S. 250, 255, 256, 58 Sp. Ct. 546), or to cases where the statute provided an illegal method of measuring or computing its tax, as in the case of a tax on the gross receipts from interstate business. *Puget Sound Stevedoring Co. v. Tax Commission,* 302 U. S. 90, 93, 94, 58 Sp. Ct. 72; *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 38 Sp. Ct. 126; *Givin, White & Prince v. Henneford,* 59 Sp. Ct. 325, 305 U. S. 434.

It is likewise undeniable that Congress has the power to tax a privilege created by State law such as the transfer of property by last will or inheritance *(Knowlton v. Moore,* 178 U. S. 41, 58, 20 Sp. Ct. 747), or the enjoyment of a corporate franchise *(Flint v. Stone Tracy Co.,* 220 U. S. 107, 155, 31 Sp. Ct. 342). That being true, there should be no reason why the state should not have the power to tax the same privilege, and Mr. Justice Cardozo indicated as much in the case of *Steward Machine Co. vs. Davis,* 301 U. S. 548, 581, 57 Sp. Ct. 883, when he said, with reference to the power of the Congress to levy excise taxes on the right to employ, that the choice of the subject matter of taxation by Congress "is as comprehensive as that open to the power of the States".

Although the right to employ may be exercised by the Federal Government, this right is one which primarly is granted by the States and reserved to them in the United States Constitution. *(Steward Machine Co. v. Davis,* 301

U. S. 548, 578-583, 57 Sp. Ct. 883; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 508, 57 Sp. Ct. 868), and even if we should agree with the contention of the petitioners that legislative power over maritime contracts rests exclusively and entirely with Congress, we think that would not preclude a state having the power to create a privilege from taxing its exercise because we think, as was said in *Gibbons v. Ogden*, 9 Wheat. 1, and *Lawrence v. State Tax Commission*, 286 U. S. 276, 279-280, 52 Sp. Ct. 556, in levying such taxes the state has co-equal power with the federal government. It may be well, however, to mention here the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sp. Ct. 524, so confidentially relied upon by the plaintiffs, which expressly says that to some extent, at least, the state may legislate with respect to maritime matters and to limited degree even change the general maritime law. In that case, Mr. Justice McReynolds says at page 216:

> "* * * it would be difficult, if not impossible to define with exactness just how far the maritime law may be changed, modified or affected by state legislation. *That this may be done to some extent cannot be denied.*" (Emphasis ours.)

The petitioners in this case are engaged admittedly in the business of increasing the navigability of streams and other navigable waters through dredging operations. An analagous business was carried on in the case of *Trinity Farm Construction Co. v. Grosjean*, 291 U. S. 466, 470-472, 54 Sp. Ct. 469. There the construction company had a contract with the federal government to construct levees in aid of navigation on the Mississippi River, and it was held

that the State of Louisiana could validly tax gasoline used in the construction of the levees.

In *Susquehanna Co. v. Tax Commission* No. 1, 283 U. S. 291, 51 Sp. Ct. 434, the validity of a state tax on submerged lands was at issue. These lands were submerged as the result of the building of a dam by the appellant under license by the Federal Power Commission to construct this dam across the navigable waters of the Susquehanna River, and the appellant claimed immunity from state taxes on the ground that it was performing a federal function. The tax was sustained and, in doing so, the court explained:

> "The exemption of an instrumentality of one Government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other." (p. 294.)
>
> "With that end in view, the distinction has long been taken between a privilege and a franchise granted by the Government to a private corporation in order to effect some government purpose, and the property employed by the grantee in the exercise of the privilege but for private business advantage." (p. 294.)

The plaintiff in the case of *Cornell Steamboat Co. v. Sohmer,* 235 U. S. 549, 35 Sp. Ct. 162, was engaged in the business of towing on the navigable waters of the United States under a license granted by the United States. The State of New York sought to impose a franchise tax upon the steamboat company which was resisted on the ground that the state had no power and jurisdiction to levy the

tax and that "it is in reality and substance an attempt to enforce a license tax for the privilege of navigating the public waters of the United States, a privilege already granted under the general government". (p. 558.) The Court dismissed that contention in the following language:

> "While the state may not require a navigation license except in very exceptional cases, as for compensation for improvements which the state has made, a situation not presented here, it may certainly as to a corporation of its own creation having property within its borders, enforce its usual and customary systems of taxation without infraction of the superior authority and laws of the United States concerning the navigation of rivers." (pp. 559-560.)

The case of *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 57 Sp. Ct. 868, is authority, inferentially at least, for the right of a state to impose unemployment insurance taxes upon maritime employers. There the Court said:

> "It is arbitrary, appellees contend, to exempt those who employ agricultural laborers, domestic servants, *seamen*, insurance agents, or close relatives, or to exclude charitable institutions, interstate railways, or the government of the United States or of any state or political subdivision. A sufficient answer is an appeal to the principle of taxation already stated, that the state is free to select a particular class as a subject for taxation. The character of the exemptions suggests simply that the state has chosen, as the subject of its tax, those who employ labor in the processes of industrial production and distribution." (p. 512.) (Emphasis ours.)

A tax on the right to employ measured by wages paid under a maritime contract is not laid upon the federal government, its property or officers, *Dobbins v. Commissioners,* 16 Pet. 435, 449, 450; or upon an instrumentality of the federal government, *McCulloch v. Maryland,* 4 Wheat. 316; *Osborn v. Bank of U. S.,* 9 Wheat. 738; *Gillespie v. Oklahoma,* 257 U. S. 501; *Federal Land Bank v. Crosland,* 261 U. S. 374; *New York ex rel. Rogers v. Graves,* 299 U. S. 401; or upon a contract with the federal government, *Western Union Telegram Co. v. Texas,* 105 U. S. 460, 464, 466; *Weston v. Charleston,* 2 Pet. 449, 468, 475; *William v. Tallodega,* 226 U. S. 404, 418, 419; *Panhandle Oil Co. v. Mississippi ex rel, Knox,* 277 U. S. 218, 222. We have been unable to find any authority in support of the view that any private corporation is entitled to any constitutional immunity from the payment of a state tax simply because it is operating in a field which the federal government has the power to regulate. That the contrary is true is shown by the case of *Alward v. Johnson,* 282 U. S. 509, 514, 51 Sp. Ct. 273, in which a state tax on automobiles used in the operation of a stage line, based upon their use of state highways and measured by gross receipts, was held applicable to one who held a mail carrier's contract with the government; by the case of *Ayer & Lord Co. v. Kentucky,* 202 U. S. 409, 420, 421, 26 Sp. Ct. 679, where it was held that a vessel plying between ports in different states may be taxed by the state of its domicile, the Court there following the rule "that the service in which these vessels are engaged formed one link in a line of interstate commerce may affect the state's power of regulation but not its power of taxation" *(Old Dominion Steamship Co. v. Virginia,* 198 U. S. 299,

306). See also *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Transportation Co. v. Wheeling*, 99 U. S. 273.

There are numerous examples of validly laid state taxes upon persons engaged in maritime pursuits and upon maritime instrumentalities, such as franchise taxes *(Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549); taxes on maritime insurance corporations (measured by premiums received on maritime insurance policies (Sec. 169 a, N. Y. Insurance Law), which the courts have held to be maritime contracts *(Aetna Insurance Co. v. Houston Oil & Transport Co.*, 49 F. (2d) 121, certiorari denied, 284 U. S. 628) and governed by the general maritime law; taxes on shipping *(Transportation Co. v. Wheeling, supra)*; tolls upon ships using state improved waterways but engaged in interstate and foreign commerce *(Huse v. Glover*, 119 U. S. 543; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288).

If such taxes are valid, we fail to understand why the Louisiana Unemployment Compensation tax should be any less so, particularly in view of the fact that the act *imposes no tax upon maritime contracts or upon the wages paid under such contracts*, but simply imposes an excise tax upon the exercise of the privilege of employing persons measured by the wages paid to them.

At this point it may be well to remark that the petitioners' confidence in their view that Article III, Sec. 2, of the Federal Constitution confers upon Congress *exclusive* general jurisdiction of maritime contracts of employment

is not justified. Chief Justice Marshall apparently did not share that view in the case of *United States v. Bevans*, 3 Wheat. 366, 388, 389. There the Chief Justice, speaking for the Court said:

> "It is observable that *the power of exclusive legislation (which is jurisdiction)* is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, *in describing the* [illegible] *had*

> "It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, *the general jurisdiction over the place*, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. *The residuary powers of legislation are still in Massachusetts.* Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have devested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction and punishable by the laws of Massachusetts? If these questions must be answered in the affirmative—and we believe they must—then the bay in which this murder was committed is not out of

> jurisdiction of a state, and the Circuit Court of Massachusetts is not authorized, by the section under consideration, to take cognizance of the murder which has been committed." (pp. 288, 389.) (Emphasis ours.)

The language of the Court simply means the article of the Constitution does no more than to confer upon federal courts admiralty jurisdiction of maritime cases, and that its purpose is not to deprive state courts of the jurisdiction they had before the constitution was adopted; nor was it [illegible] purpose of the article to confer upon Congress the [illegible] power to determine the content of maritime law. [illegible] this point we again refer the Court to the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 216, in which it is said:

> * * * it would be difficult, if not impossible to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.* (Emphasis ours.)

The petitioners argue that they carry on their operations under a maritime license granted by the federal government and that the Louisiana Unemployment Compensation Law affects the rights granted under that license. That argument was disposed of by the District Judge (R. 44-45, 43 F. Supp. 989), who said nothing in the statute remotely affects this maritime license and that the cases relied on by the complainants involved an effort to superimpose additional license requirements which, under severe penalty, had to be complied with as a condition

precedent to navigating United States waters in commerce. It is difficult to understand how the imposition of a tax on maritime employers in any way affects the exercise of their maritime license rights. If the argument is an attempt to establish that the federal and state governments have no concurrent rights insofar as the exercise of the taxing power is concerned with respect to matters in which the federal government may have a legitimate interest, the petitioners' position is completely in conflict with the trend of opinion of the Supreme Court of the United States. *McGoldrick v. Berwind-White Coal Mining Co.*, 60 Sp. Ct. 388 (Jan. 29, 1940).

The petitioners' objection to the asserted regulatory provisions of the Louisiana statute and its asserted interference with maritime employment and the resulting effect on their license rights will be discussed in the succeeding topic.

V.

THE STATUTE UNDER ATTACK DOES NOT IMPAIR THE GENERAL MARITIME LAW OR ANY ACT OF CONGRESS, OR INTERFERE WITH THE HARMONIOUS AND UNIFORM OPERATION OF THE MARITIME LAW.

Having shown that the workmen's compensation acts are totally irrelevant to the issue presented in this case and that, in enacting the Unemployment Compensation Law, the State of Louisiana exercised its concurrent power

to impose a non-discriminatory excise tax as an attribute of sovereignty antedating the Federal Constitution, which that instrument reserves to it, we now intend to meet the plaintiffs' argument that the statute interferes with the harmonious and uniform operation of the general maritime law.

Bouvier says (Vol. 2, p. 2092, 3rd Rev.) that maritime law is "that system of law which particularly relates to the affairs and business of the sea, to ships, their crews and navigation, and to the maritime conveyance of persons and property". In *The Blackheath Case*, 195 U. S. 361, 25 Sp. Ct. 46, Mr. Justice Holmes explains that "the precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history", indicating in plain words how indefinite is the scope of the constitutional grant of jurisdiction, but it is conceded that its scope is determinable by the federal courts. Hence, Congress plays an important role in determining what matters are and are not within the scope of the power granted. But the states also may play some part in determining the content of the general maritime law, as shown by the portions of the opinions reproduced above from the cases of *Southern Pacific Co. v. Jensen, supra*, p. 216, and *United States v. Bevans*, 3 Wheat. 366, 388, 389. See also *The Lottawanna*, 21 Wall. 558, 578, 579; *The Hamilton*, 207 U. S. 398; *La-Bourgogne*, 210 U. S. 95, 138; *Western Fuel Co. v. Garcia*, 257 U. S. 233 and cases cited in *City of Norwalk*, 55 Fed. 98, 106.

The petitioners in the District Court made no effort to point out how the tax imposed by the Louisiana statute

changes or modifies the maritime law or interferes with its harmonious and uniform operation, there simply contenting themselves with saying that it does and that the federal courts have invalidated the workmen's compensation acts in so far as they relate to maritime employment and, hence, unemployment compensation acts must do so. Here, however, as in the Court of Appeals, as a pure afterthought, they say that the Louisiana statute, like other state unemployment compensation laws, not only taxes but uses the taxing power to actually regulate maritime employment by (1) providing a regulatory merit system by means of which stabilization of employment is to be attained by varying the tax on employers so as to reduce the rate on those whose employment record is good and to increase it on those who more frequently discharge or otherwise lose their employees, (2) by certain provisions of the statute imposing upon employers the duty of keeping records, making reports, and like provisions for the enforcement of the law usually found in taxing statutes, and finally (3) by requiring employers to collect the tax partly from their employees in the face of a federal statute requiring maritime employers to pay their employees in full within 48 hours after the wages are due.

The argument of the petitioners is based largely upon a non-existent state of facts. The Louisiana statute does not now contain and never contained any merit system. It solely provides that certain data shall be assembled by the Administrator and employment records kept by him for use in making reports to the Governor and the Legislature on the advisability of amending the law so as to provide at some future time a merit system with a fluctuating tax rate. Act 97 of 1936, Sec. 6, as amended by Act 164 of

1938 and by Act 11 of 1940. That section of the 1936 act, which contained a provision for future tax rates (Sec. 6(c)) by its terms provided that it would not become effective until January 1, 1941, (Sec. 6 (b) (4)) and the same section of the 1938 act, with respect to future tax rates (Sec. 6(c)), provided that such rates would not be effective until July 1, 1941 (Sec. 6(c) (3)). When the Legislature met in 1940, it amended Section 6 of the act by Act 11 of that year by eliminating the provision relative to future tax rates and substituting therefor as Sec. 6(c) the following:

> "The administrator shall investigate and study the operation of this act and actual experience hereunder with a view of determining the feasibility of establishing a rating system which would equitably rate the unemployment risk and fix the contributions to the fund of each employer and would encourage the stabilization of employment. The administrator shall submit his report and recommendations to the governor and the legislature."

It is evident, therefore, that the merit system provided for the future in the acts of 1936 and 1938 never became effective because the provision therefor was eliminated by the 1940 act before the effective dates provided in the former acts. That being true, there is now and has been since the year 1938 a fixed tax on employers of 2.7% of the wages paid (Sec. 6). The Court will also observe that the 1940 act makes no provision for any contribution by employees.

There is no necessity to discuss the argument of petitioners relative to the alleged regulatory features of the

statute since that argument is based upon a misconception of the contents of the law. If and when Louisiana adopts the so-called merit system the petitioners will have their day in court, but then they will have to contend with much unfavorable language in *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 Sp. Ct. 883, where much the same contention was made and rejected by the Court. There the Court said:

> "'Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.' Sozensky v. United States, supra (300 U. S. 506). In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."

See also pages 593 and 594 where the Court said the inclusion of merit ratings in state unemployment acts is permissible.

As to the provisions relative to record keeping and reporting of the tax, it is sufficient to say that, if the tax is valid, so are the provisions for its enforcement. The other provisions complained of, relative to hearings, appeals, etc., do not affect employers but apply only to claims made by employees against the state.

The petitioners, therefore find themselves in the same difficult situation they were in the District Court where they were powerless to explain how the payment of unemployment insurance benefits to an unemployed claim-

ant by the state or contributions paid by an employer to a state fund for the payment of such benefits in any way alters or affects a maritime contract of employment. Certainly its payment by the State to an unemployed seaman of benefits could not affect the maritime law and, if the payment of the excise tax by the petitioners to the state would do so, it would follow that the state could not validly levy franchise taxes, sales taxes and numerous other state and local taxes, which the courts have upheld. Likewise, the fact that the wages paid is the measure of the tax imposed has no effect on the maritime law. The statute imposes obligations on the employer in favor of the state and not in favor of his employees, and the rights of these employees must be asserted against the state, not against the employer. None of the rights and liabilities under the maritime contract of employment are affected. *Beeland Wholesale Co. v. Kaufman, supra.* Mr. Justice Brandeis said in *Red Cross Line v. Atlantic Fruit Co.,* 264 U. S. 109, 125, 44 Sp. Ct. 274:

> "In no case has this court held void a state statute which neither modified the substantive maritime law, nor dealt with remedies enforceable in admiralty."

But we need not anticipate the reasons which the petitioners may give in support of their contention that the act is unconstitutional. The burden of showing that is upon them and that burden is not discharged unless they show clearly and beyond any reasonable doubt that the statute contravenes the substantive maritime law. *El Paso & Northeastern R. Co. v. Gutierrez,* 215 U. S. 87, 30 Sp. Ct. 21; *People v. Crane,* 214 N. Y. 154, 108 N. E. 427. They have failed to do this and it would indeed be difficult

for them to do so in view of the fact that the rights and liabilities created by the statute do not arise out of or in any way depend upon a maritime contract. The employer's liability is to pay a tax; the employee's rights are to receive benefits from the state when he becomes unemployed. Certainly a statute enacted for the beneficient purpose of curing the evils of unemployment and its resultant dangers to society should not be invalidated except for grave reasons. The views of Chief Justice Crane on this subject in the case of *Chamberlin v. Andrews*, 271 N. Y. 1, 2 N. E. 2d 22, are enlightening:

> "The fact is that in the past few years enormous sums of State and Federal money have been spent to keep housed and alive the families of those out of work who could not get employment. Such help was absolutely necessary, and it would be a strange kind of government, in fact no government at all, which could not give help in such trouble.
>
> "The Legislature of the State, acting after investigation and study upon the report of experts, has proposed what seems to it a better plan. Instead of solely taxing all the people directly it has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief be under this new law of the legislature or under the dole system the public at large pays the bill * * *.
>
> "I can see, therefore, nothing unreasonable or unconstitutional in the legislative act which seeks to meet the evils and dangers of unemployment in the future by raising a fund through taxation of employers generally * * *.

> "The peril to the State arises from unemployment generally not from any particular class of workers. So likewise, employers generally are not so unrelated to the unemployment problem as to make a moderate tax upon their payrolls unreasonable or arbitrary." (pp. 9, 10.)

It must be conceded, of course, that the statute would be invalid if it contravened the essential purpose of an act of Congress, or was materially prejudicial to the characteristic features of the maritime law, or interfered with the harmonious and uniform operation of the general maritime law; all as stated in the *Jensen Case*. The appellants appear to limit their attack on the statute on the basis of its alleged violation of the uniformity rule, which pre-supposes that the constitutional requirement of uniformity is an inexorable one in the silence of Congress on subject matter best adapted to local treatment.

Unlike the jurisdiction over interstate and foreign commerce, which is expressly granted in the constitution (Art. 1, Sec. 8, Cl. 3), the power of Congress over admiralty is in the nature of an implied constitutional grant. (Art. 3, Sec. 2.) *Do petitioners desire to assume the position that states are free to act on a matter where legislative power is expressly granted to Congress, in the absence of its exercise by Congress, but where the power in Congress exists by implication only, State action is prohibited?* Yet if they contend that the states are precluded from enacting legislation relative to maritime matters, it will be necessary for them to answer the above question in the affirmative.

Authorities are unlimited in support of the proposition that the states are competent to act despite an express grant of power to Congress where Congress either is silent or affirmatively encourages such State action and where the subject matter does not demand national and uniform treatment but is susceptible of local treatment or where local treatment is considered to be desirable because of the diversity of the local conditions to be regulated.

In the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sp. Ct. 729, 741, Mr. Justice Hughes said:

> "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the State should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities,

to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. *Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power.* In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible." (Emphasis ours.)

And on p. 399 (p. 740 of Sp. Ct. Reporter) it is said:

"It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. *In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act;* and, when Congress does act, the exercise of its au-

thority overrides all conflicting State legislation." (Emphasis ours.)

The unemployment problem is certainly one which involves the interest of a state in the health, safety, morals and welfare of its people. The theory behind the enactment of the Louisiana Unemployment Compensation Law is clearly consistent with this view. We quote Section 1 of said act:

> "Declaration of State Public Policy. As a guide to the interpretation and application of this Act, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this State. Unemployment is therefore, a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons."

It is a matter which clearly demands diversity of treatment according to the special requirements of local conditions.

In upholding a state law as not being in conflict with the Federal Constitution, which law provided that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots of a port for the use of the Society for the Relief of Distressed Pilots one half of the regular amount of pilotage payable, in the case of *Cooley v. Board of Wardens*, 12 How. 299, *318-319*, the Court said:

> "* * * But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, *like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.*" (Emphasis ours.)

> "Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national,

or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress; that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; * * *" (Emphasis ours.)

Despite Article 1, Section 8, of the Federal Constitution giving Congress power over interstate commerce, in the absence of conflicting legislation by Congress the States have invaded the field to a very great extent. Proof of this assertion comes from the following:

Laws requiring locomotive engineers to be examined and licensed by State authorities, *Smith v. Alabama,* 124 U. S. 465, 482; requiring such engineers to be examined for defective eyesight, *Nashville, Chattanooga & St. Louis Ry. v. Alabama,* 128 U. S. 96, 100; requiring telegraph companies to receive dispatches and transmit and deliver them diligently, *Western Union Tel. Co. v. James,* 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington v. Georgia,* 163 U. S. 299, 304, 308; regulating the heating of passenger cars, *N. Y., N. H. & H. R. R. Co. v. N. Y.,* 165 U. S. 628; prohibiting railroad companies from contracting away liability for torts, *Chicago, Milwaukee & St. Paul R. R. Co. v. Solan,* 169 U. S. 133, 136, 137; prohibiting the transportation of diseased cattle in interstate commerce, *Mints v. Baldwin,* 289 U. S. 346; *Missouri, Kansas & Texas Ry. Co. v. Haber,* 169 U. S. 613, 630, 635; *Reid*

v. Colorado, 187 U. S. 137, 147, 151; regulating the character of locomotive headlights, *Atlantic Coast Line R. R. Co. v. Georgia,* 234 U. S. 280; and the establishment of quarantine regulations, *Morgan's L. & T. R. & S. S. Co. v. Board of Health,* 118 U. S. 455.

At this juncture it might be well to note the reliance of petitioners in the case of *Southern Pacific Company v. Jensen,* 244 U. S. 205. They discussed the *Jensen* case with the hope of establishing that Congress possesses exclusive jurisdiction to fix and determine the maritime law, which shall prevail throughout the country. That case, however, cannot be cited as authority against the enactment of an unemployment compensation law. On the contrary that case is authority for the proposition that where a subject is not national in its character and does not require uniformity of regulation, the state may act thereon in the silence of or at the invitation of Congress. We again quote from that case:

> "In view of this constitutional provision and Federal Act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by State legislation. *That this may be done to some extent cannot be denied.*" (Emphasis ours.)

More specific is the opinion in the case of *Just v. Chambers (The Friendship II),* 312 U. S. 668, 61 S. Ct. 687 (1941). There the Court said:

> "* * * a state in the exercise of its police power may exercise rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided the state action 'does

not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in international and interstate relations.'"

Since states have a right to legislate in the field of interstate commerce because of the inaction of Congress, *a fortiori*, Article 3, Section 2 of the Federal Constitution does not inhibit states from similarly invading the maritime field, and they have been permitted to do so.

Thus, in the realm of navigation, in the absence of exclusive legislation by Congress, the authority of the states to establish regulations effective with their borders has always been recognized (*Cooley v. Board of Wardens*, 12 How. 299, 320; *Steamship Co. v. Joliffe*, 2 Wall. 450, 459; *Ex parte McNeil*, 13 Wall. 236, 241; *Wilson v. McNamee*, 102 U. S. 572; *Olson v. Smith*, 195 U. S. 332, 341; *Anderson v. Pacific Court S. S. Co.*, 225 U. S. 187, 195); and States may construct dams and bridges across navigable streams notwithstanding that interference with accustomed navigation may result, in the absence of conflicting legislation by Congress, on the theory that local regulation is more suitable than national uniform treatment (*Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 252; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208; *Hamilton v. Vicksburg, etc. Railroad*, 119 U. S. 280; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8; *Manigault v. Springs*, 199 U. S. 473, 478). See also *Port Richmond, etc. Ferry Co. v. Hudson County*, 234 U. S. 317, 331 (State statute fixing tolls for transportation on interstate ferry). States may also

regulate wharfage charges and exact tolls on the instrumentalities of interstate commerce by water (*Keokuk Packet Co. v. Keokuk*, 95 U. S. 80; *Cincinnati, etc. Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691.) See also *County of Mobile v. Kimball*, 102 U. S. 691, 697 (harbor improvements); *Huse v. Glover*, *supra*, p. 548; *Cummings v. Chicago*, 188 U. S. 410, 427 (improvements and obstructions to navigation); and *Sands v. Manistee River Improvement Co.*, *supra*, p. 295 (tolls for use of an improved waterway).

As a result of the above discussion of authority, we may safely reiterate this conclusion: *States are competent to act despite an implied or expressed grant of power to Congress where Congress is either silent or affirmatively encourages such state action and where the subject matter does not demand national and uniform treatment but is susceptible of local treatment or where local treatment is considered to be desirable because of the diversity of local conditions to be regulated.* If state legislation may supplement the maritime law in the absence of action by Congress, and the subject matter appears to be appropriate for local treatment, certainly unemployment insurance legislation neither affecting, modifying nor supplementing the general maritime law is valid.

Congress had not passed any unemployment compensation laws applicable to maritime workers. On the contrary, it invited the States to enact legislation in the field of unemployment insurance in Titles IX and III of the Social Security Act and thereby placed itself on record

that the subject may be best dealt with by state legislation. It did this by imposing in the Social Security Act a tax which would induce the states to pass unemployment insurance laws but stipulated therein no provisions which the states should enact, leaving them free to determine what employers and what employees should be affected. So much is said in "Unemployment Compensation, What and Why", published by the Social Security Board in 1937 (Publication No. 17), from which we quote the following:

> "The Social Security Act as described in the preceding chapter establishes a Federal-State cooperative system of unemployment compensation which leaves to the States the power and initiative of passing unemployment compensation legislation and permits them wide latitude with regard to the type of plan they wish to establish. * * *
>
> "Except for these requirements (minimum criteria for approval of the State law as a bona fide unemployment compensation law, and which safeguard its due and proper administration) the Federal Government does not restrict the freedom of the States to set up any type of unemployment compensation system they desire. Basic and fundamental policy decisions are left entirely in the hands of the State. It must designate the groups to be protected and those to be excluded. It is free to add or not to add employer contributions to the system if it so desires, * * * Likewise, it determines its own benefit rates, waiting period, amount and duration of benefits, the conditions under which the unemployed covered individuals may receive benefits, and the administrative arrangements necessary for the operation of the system."

And the same view was taken by the Supreme Court in the case of *Steward Machine Co. v. Davis, supra,* in which it was said:

> "'* * * A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York and elsewhere. *They may establish a system of merit ratings applicable at once or to go into effect later on the basis of subsequent experience.* Cf. Sections 909, 910. * * * *They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all.* This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. *Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute.'"* (pp. 593, 594.) (Emphasis ours.)

And again in *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co.,* 2 S. E. (2d) 584, the Supreme Court of North Carolina said in 1939:

> "* * * there are numerous variations apparent in the respective state unemployment compensation acts. *Such variations in the State Laws and the*

interpretations given them are but reflections of the considerable latitude necessarily allowed the individual states to the end that they may work out compensation acts suited to their own peculiar needs." (Emphasis ours.)

In Senate Report No. 628, Cal. No. 661, 74th Congress, the Committee of Finance said at page 14:

"There are good arguments to be made in favor of each of these types of unemployment compensation laws. In accordance with the entire spirit of the Social Security Act, we believe that the *Federal Government should not attempt to dictate to the states which type of compensation law they should adopt.* The amendment we suggest to the House Bill will eliminate all such dictation *and leave the states free to decide for themselves which type best suits their local conditions.*" (Emphasis ours.)

And in its report to the President (U. S. Gov. Printing Office, 1935) the President's Committee on Economic Security said at page 4:

"We believe further that the Federal Act * * * should leave wide latitude to the states * * * *as we deem experience very necessary with particular provisions of unemployment compensation laws in order to conclude what types are most practicable in this country.*" (Emphasis ours.)

The necessity for local treatment of unemployment compensation is pointed out by the Social Security Board in its publication "Unemployment Compensation, What and Why", above referred to, in its discussion of the problems presented to legislatures of the several states under the

following headings: (1) "Who shall be covered?"; (2) "Who shall contribute?"; (3) "What type of fund shall be established?"; (4) "What kind of employment shall be compensated?"; (5) "How long shall the waiting period be?"; (6) "What shall eligibility for benefits depend on?"; (7) "Shall any periods of involuntary unemployment be compensated?"; (8) "How large shall the benefits be?"; (9) "How shall unemployment compensation be administered?"

Manifestly, where opinions on such a subject, dealing with the proper provisions of an unemployment compensation law, differ so widely so as to meet widely different conditions and situations in the several states unemployment insurance necessarily demands local treatment.

It is contended by petitioners that section 1607 (c) (4) of the Internal Revenue Code as amended (originally section 907 (c) (3) of the Social Security Act) is an unequivocal expression by Congress that members of the crews of such vessels (dredges) are not to fall within the scope of (State) unemployment compensation legislation; that this is further evidenced by administrative rulings of the Bureau of Internal Revenue; that practical considerations lead to the same conclusion and that the principle of uniformity in the maritime law forbids state action. These contentions will be briefly discussed *seriatim*.

In the first place, petitioners state that Congress has provided directly that members of the crews of vessels on the navigable waters of the United States are exempt from provisions of the Social Security Act and infer that this

act is a federal unemployment compensation statute. There is, of course, no such statute and petitioners' inference that titles III and IX of the Social Security Act constitute an unemployment compensation statute might convey the impression that the Federal Government has, in fact, entered into the field of unemployment compensation generally. If petitioners were correct in that view, it would be possible for them to argue, with hope of success, that the Louisiana legislature has undertaken to legislate in a field in which Federal jurisdiction is exclusive and that the effect of the State law is to disturb the uniformity of the Federal law on unemployment compensation. In support of its view, the plaintiffs could invoke the doctrines expressed by the *Jensen Case*, the *Knickerbocker Ice Co. Case* and the *Dawson Case*, claiming that they were directly applicable to the issues under dispute.

The facts being entirely different than suggested by petitioners, it would seem that their argument should fail. In no true or fair sense can it be said that titles III and IX of the Social Security Act constitute an unemployment compensation law. Title III only authorized Federal grants to defray the expenses of administration of unemployment compensation laws to States whose laws meet prescribed standards. Title IX levied a tax on the exercise of the privilege of employment, the proceeds of which were to be paid into the Federal Treasury. It provided for a credit, not to exceed 90% of the amount of the tax payable, based on contributions paid to a State under a State unemployment compensation law which conformed to prescribed minimum standards. Title IX did not contain any provisions such as the Louisiana law under con-

sideration describing the conditions of eligibility for benefits, conditions of disqualification, rate and duration of benefits, and related matters. The administrative agency set up under the Federal act, the Social Security Board, had no power to administer a system of unemployment compensation. Its powers were limited to the approval of State laws, assistance in the coordination of the activities of Federal and State agencies and research in the field of the social sciences for the purpose of assisting Congress in formulating policies in connection with social security legislation.

It would seem to be accurate, therefore, to state that the Federal Government has exercised its privilege to abstain from assuming its constitutional jurisdiction in the field of unemployment compensation and has clearly evidenced a desire that the States undertake the responsibility of legislation with respect to that subject matter. This general statement is subject to one exception: In the field of interstate transportation, Congress has not seen fit to leave it to the States to enact and administer unemployment compensation laws and has taken the customary action to evidence its assumption of exclusive constitutional jurisdiction, namely, positive legislation. In the Federal Railroad Unemployment Insurance Act, approved June 25, 1938, Congress appears to have unequivocally asserted its jurisdiction over the field of unemployment compensation as it might apply to carriers and their associated facilities and to their employees, and thereby effectively barred State action covering that subject matter. No such action was taken with respect to maritime employment.

It is most significant that in the Report to the President of the Committee on Economic Security (Government Printing Office, 1935) upon which the subsequently enacted Social Security Act was based, it was said:

> "We are opposed to exclusions of any specified industries from the Federal act, but favor the establishment of a separate nationally administered system of unemployment compensation for railroad employees and maritime workers."

Thus it would seem, that at the time of the enactment of the original Social Security Act in 1935 it was contemplated that the Federal Government, in the future, would enter upon the field of unemployment compensation with respect to two classes of employees. The fact that positive action has been taken with respect to railroad workers and that no further action has been taken with respect to maritime workers leaves one with the conclusion that Congress has either been silent in the maritime field or has indicated its lack of objection to State action. The fact that Congress, up to the present time, has failed to enact a Federal System of unemployment compensation for seamen and maritime workers is further evidenced by the lack of success which has attended efforts to obtain such legislation. In the 76th Congress, 1st Session, there was introduced a bill entitled H. R. 2553 which was referred to the Committee on Ways and Means; in the 3d Session of that Congress, there was introduced H. R. 9798 which was referred to the Committee on Merchant Marine and Fisheries. Although hearings have been held on the latter bill, both bills still remain in committee.

The most plausible argument that can be made by the petitioners is that by exempting from a Federal taxing statute "service performed as an officer or member of the crew of a vessel on the navigable waters of the United States" (section 907 (c) (3)) Congress has declared to the States that the Federal Government alone is competent to enact an unemployment compensation law with regard to individuals who were in maritime employment. But this is tantamount to saying that a failure or refusal to exercise jurisdiction may be taken to signify positive and affirmative assumption of jurisdiction. This, however, would seem to be unsound. If Congress had the intention ascribed to it by petitioners, it undoubtedly would have taken action which affirmatively and unequivocally indicated its intention to deny to the States entrance upon the field of unemployment compensation as applied to maritime employment. Thus, when the Federal Government entered the field of unemployment compensation with respect to employees of interstate carriers, it made the following affirmative declaration of jurisdiction in the Railroad Unemployment Insurance Act:

> "By enactment of this Act the *Congress makes exclusive provision for the payment of unemployment benefits for unemployment* occurring after June 30, 1939, based upon employment (as defined in this Act). No employee shall have or assert any right to unemployment benefits under an unemployment compensation law of any State with respect to unemployment occurring after June 30, 1939, based upon employment (as defined in this Act). The Congress finds and declares that *by virtue of the enactment of this Act, the application of State unemployment compensation laws after June 30, 1939, to such employment,*

> *except pursuant to section 12 (g) of this Act, would constitute an undue burden upon, and an interference with the effective regulation of interstate commerce.* In furtherance of such determination, after June 30, 1939, the term 'person' as used in section 906 of the Social Security Act shall not be construed to include any employer (as defined in this Act) or any person in its employ: *Provided,* That no provision of this Act shall be construed to affect the payment of unemployment benefits with respect to any period prior to July 1, 1939, under an unemployment compensation law of any State based upon employment performed prior to July 1, 1939, and prior to such date employment as defined in this Act shall not constitute 'Service with respect to which unemployment compensation is payable under an (or "service under any") unemployment compensation system (or "plan") established by an Act of Congress' (or 'a law of the United States') or 'employment in interstate commerce, of an individual who is covered by an unemployment compensation system established directly by an Act of Congress,' or any term of similar import, used in any unemployment compensation law of any State." (Section 13(b) Railroad Unemployment Insurance Act.) (Emphasis ours.)

It is difficult to understand how such a theory as petitioners advance can be based upon a mere exemption in a Federal Revenue Law.

If it be asked, then, what purpose the exemption served, the answer would not seem to be difficult. There is excepted from the definition of "employment" and, therefore, from the application of the tax imposed by title IX, services performed in agricultural labor, services per-

formed for charitable, educational and scientific institutions, services performed as an officer or member of the crew of a vessel on the navigable waters of the United States, etc. These exclusions were dictated by various reasons of congressional policy. In some instances, the exclusion is based upon administrative convenience. In others, it is a desire either to foster or aid the organizations for which such services were performed or the industry to which they belonged. But, in classifying those who would be covered by title IX of the Social Security Act, Congress in no wise intended to fix or determine the limit of coverage of the types of service to which a State might wish to apply an unemployment compensation law. Thus, the exemption from the application of the Federal tax of "Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States" has not operated to prevent the States of Colorado and New York from passing unemployment compensation laws without any reference to the Federal exclusion. Furthermore, it has not prevented the State of Louisiana from making a substantial modification in the language of the exemption in the Federal Act. State unemployment compensation laws have varied in their coverage to a considerable extent from that prescribed by the Federal Tax Statute. These variations are evidence of the fact that the States as well as the Social Security Board, who approved these State statutes, thought that Congress had no intention whatsoever that State statutes should follow the Federal example in regard to the exclusions in the Federal Act. Congress, in Section 907 (c), was merely expressing its own intentions with respect to the application of a Federal Revenue law and was indicating no disposition

whatsoever with respect to the permissible scope of coverage under a State law of maritime workers or seamen.

By excepting service of officers and members of a crew of a vessel on the navigable waters of the United States from the definition of "employment" and thereby exempting employers of such service from the application of the Federal tax, Congress, in effect, took no position with respect to coverage by the States of maritime workers. It took no action on the question of jurisdiction and left the question where it was prior to the enactment of the Social Security Act. If prior to that date, under the exercise of its police powers, a State might require employers of individuals performing maritime services to contribute to a special fund dedicated to the payment of benefits to unemployed individuals, including their own, they could do so after that date.

Plaintiffs refer to a ruling of the Bureau of Internal Revenue issued in January 1937 (cited as XVI-4-8504, SST 78). Presumably, reference is made to that ruling to support the contention that by virtue of the exemption of services performed by officers and members of a crew of a vessel on the navigable waters of the United States from the Federal tax, Congress "pre-empted" the field. It is doubtful that the administrative ruling cited is competent to shed light upon the extent to which, in the Social Security Act, Congress has positively entered into the field of unemployment compensation for maritime workers or has positively prohibited such action to the States. The statute would seem to speak for itself in that regard. But even assuming that in that connection the administrative ruling carries weight, it is submitted that it does not

stand for the proposition advanced. It is readily conceded that it declares that dredges used for navigation and transportation in deepening and removing obstructions from channels and harbors are "vessels". The headnote preceding the ruling so states. The ruling, however, does not purport to answer more than this question:

> "Advice is requested whether dredges are 'vessels' * * *."

A careful reading of the ruling will reveal that there is no consideration whatsoever given therein to whether the services were performed by officers or members of a crew. The ruling merely holds that where officers and members of a crew perform services on such vessels under certain circumstances, the services are excepted from the coverage of the Federal act. Indeed, the ruling does not even describe the nature of the services performed by the individual on the dredge.

The plaintiffs made no mention of SST 336 (Internal Revenue Bulletin, 1939-1, p. 300) in which ruling the Bureau of Internal Revenue held that lighter captains, scow captains, bargemen and other individuals performing services on board non-self propelled lighters and barges (held to be "vessels") are *not* officers and members of the crew within the meaning of the exemption from the Federal act. The services performed by the individuals referred to in the ruling, as described therein, appear to be similar to those performed by plaintiffs' employees. The decision makes it clear that the services were performed on vessels on the navigable waters of the United States. Thus, we have an instance of an agency of the

Federal Government holding that individuals performing work similar to that rendered by plaintiffs' employees are *not* within the exemption of the Federal taxing statute. If weight is to be given to the rulings of that Bureau in seeking to ascertain the legislative intention, it would appear that SST 336 demonstrates that it was *not* intended by Congress, when it enacted the Social Security Act and exempted services by officers and members of a crew of a vessel on the navigable waters of the United States that the Federal Government should assume jurisdiction over the field of unemployment compensation as applied to such workers as are described in SST 366 or in the complaint herein, nor that the States should be forbidden to trespass on that field.

The petitioners rely upon the case of *Buckstaff Bathhouse Co. v. McKinley*, 308 U. S. 358, 60 Sp. Ct. 279, to support their contrary view. While there may be a statement in the opinion there from which the inference may be drawn that the exceptions from the term "employment" in the State unemployment compensation acts should conform to those contained in the Social Security Act, that question was not directly involved in the *Buckstaff* case. The question was solely whether an Arkansas corporation operating a bathhouse on a government reservation for profit under a lease from the Secretary of the Interior was an instrumentality of the United States exempt from the tax levied by the Social Security Act. Both the federal and the state statutes exempted such instrumentalities and there was no question involved as to any variance between the two statutes.

The Court said that the federal act was an attempt to find a method by which the states and the federal government could "work together to a common end"; that before many states "held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors", as pointed out in *Steward Machine Co. v. Davis*, 301 U. S. 588, 57 Sp. Ct. 891, but, as further pointed out in that case, the federal statute does not require a surrender by the states of powers essential to their quasi-sovereign existence.

In the *Buckstaff* case the Court further said that:

> "The exclusion of federal instrumentalities from the scope of the Federal act, and hence from the complementary State systems, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from State taxation."

The employers in the case at bar do not come within the class of employers immune from state excise taxes.

If the *Buckstaff* case did appear to suggest that the states should confine their coverage in their unemployment compensation acts to that of the Social Security Act, the action of the legislatures and the decisions of the courts in the meanwhile evidence a view that the Court intended the suggestion not as a prohibition. There are a number of adjudications, in addition to the *Cassaretakis* case, *supra*, which hold that the coverage of a state unemployment compensation law and that of the Social Security Act need not necessarily be the same. *Shore Fisheries v. Board of Review*, 127 N. J. L. 87, 21 Atl. 2d 634; *Capitol*

Building & Loan Association v. Kansas Commission, 148 Kans. 446, 83 P. 2d 106; *Fidelity-Philadelphia Trust Co. v. Hines*, ... Pa. ....., 10 Atl. 2d 552; *Jefferson Standard Life Insurance Co. v. North Carolina Unemployment Compensation Commission*, 215 N. C. 479, 2 S. E. 2d 584. These cases uniformly reject the argument that the coverage of a state law must necessarily be co-terminous with that of the federal act in cases involving the employment relationship and exemptions by type of service. The argument is supported further by the wide variety of exclusions of various types of service in which state acts differ from the federal act.

8 George Washington Law Review 990, 992-993 has this to say about the *Buckstaff* case:

> "The instant case also carries the suggestion that if the class of which petitioner is a member had been excluded from the Federal Act, such class would have been saved from the 'reciprocal state systems'. While it is conceivable that Congress might *prohibit* states from covering under their laws those associated with the Federal government in the same manner as the petitioner here; cf., *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 90, Sp. Ct. 15, 84 L. Ed. 16 (1939); this situation seems quite different from that in which Congress might *merely choose* to exclude the petitioner's class from the provisions of the Federal Act. It seems reasonably clear that *such an exclusion alone would not necessarily deny the states the power to include under their laws persons such as those independently contracting with the United States who are not constitutionally immune. The provisions in state laws clearly intend a broader coverage than that of the Federal Act.* Some state laws, by covering em-

ployers of but one or more, and most by different definitions of 'employer' and 'employment' than those of the Federal Act, see C. C. H., Unemployment Insurance Service, obviously have broader coverage than title IX of the Federal Act and have been so recognized by the courts, Colorado Industrial Comm. v. Northwestern Life Ins. Co., 103 Colo. 550, 88 P. (2d) 560 (1939); North Carolina Compensation Comm. v. City Ice & Coal Co., 216 N. C. 6, 3 S. E. 2d 290 (1939), and *the instant opinion would not seem to suggest* in any sense a requirement *that states confine their coverage to that of the Federal Act.* Cf., Carmichael v. Southern Coal & Coke Co., supra, at page 512." (Emphasis ours.)

The petitioners advanced the argument that the uniform operation of the maritime law is interfered with by the Louisiana statute because the vessels upon which the services under consideration were performed are not employed continuously within a single state and periodically enter various jurisdictions in the course of their normal operations. This argument, of course, assumes that the subject of unemployment compensation is one which in its nature must be uniformly prescribed and administered. The Supreme Court of the United States, in the *Jensen* case, the *Knickerbocker Ice Company* case and the *Dawson* case, so conceived the rights and remedies of maritime employers and employees insofar as tortious acts are concerned, but this does not mean that that Court would hold that the uniformity conceived to be essential in field of maritime insurance is also essential in the field of unemployment compensation. Indeed, the very existence of a federal-state system argues to the contrary and evidences a legislative judgment that unemployment compensation be

conceived and administered upon a local basis. An exception should be noted, of course, in the case of interstate railroad workers but, in that situation, the Congress saw fit to enact positive legislation in order to assure that the requirements of uniformity will be served. Thus far, however, it does not seem to have deemed it necessary to legislate with respect to maritime workers.

In challenging the respondent's statement that the Congress in the enactment of the Federal Social Security Act, recognized the constitutional right of the state to enact unemployment compensation legislation as to maritime employment by inviting the states to legislate thereon, the petitioners argued below that the fallacy of this statement is evidenced by the fact that no state except Louisiana has accepted the alleged invitation by any attempt to extend such legislation into the maritime field. This statement is misleading in that it infers that, if a State unemployment compensation law does not make specific reference to maritime employment in its coverage provisions, it must necessarily mean that the legislature did not intend to have the law apply to such employment. An examination of the unemployment compensation laws of the many jurisdictions in which such laws have been enacted discloses that the coverage of these laws is expressed in general terms and no effort was made by the enacting legislatures to designate those industries which were to be subject to the laws. Therefore, the failure to provide *affirmatively* that maritime services such as are involved in this case are within the coverage of the act cannot be taken to evidence a legislative intention to exclude them. This position is subject to one qualification, namely, that a legislative intention to exclude an industry

or a type of service may be evidenced in a *negative* manner by a specific exception thereof from the definition of employment. Thus, an exception of services performed by officers and members of the crew of a vessel on the navigable waters of the United States, etc., would exempt individuals performing such services from the application of the act, but would not exempt others engaged in the field of maritime jurisdiction who, for example, were not members of a crew. It may be conceded that services performed by officers or members of the crew of a vessel on the navigable waters of the United States are exempted from the operation of most of the State laws and such services would be excepted from the operation of the Louisiana law only where the vessel is "customarily operating between ports of this State and ports outside this State." (Section 18(g) (6) (C).) It is respondent's contention, however, that the services involved in this case were not performed by officers or members of the crew of a vessel so operating and that, therefore, the exception does not apply.

Indeed, despite the lack of any specific reference in the coverage provisions of their unemployment compensation laws to services within the maritime jurisdiction of the United States, the States of Oregon, Missouri, Iowa, New York and New Jersey, in addition to Louisiana, have construed their laws to be applicable to maritime services of a type which the petitioners argued cannot be touched by State unemployment compensation legislation. See especially, *Claim of Cassaretakis* (New York), 44 N. E. 2d 391. The commissions administering the unemployment compensation law in Iowa and Missouri held that services of

individuals on barges in connection with the laying of mats on river banks were covered by the respective State Laws (see *Decision No. 39 C-8 dated July 18, 1939, of the Iowa Commission and Decision No. C-167 dated June 8, 1940, of the Missouri Commission). The Oregon Commission in Decision No. 39-C-24 dated August 10, 1939,* held that workers on a drill barge on the Columbia River were covered by the State law (see also *Puget Sound Bridge & Dredging Co. v. State Unemployment Compensation Commission,* 126 P. 2d. 37). *The Appeal Board of the New York agency in case No. 132-38 (550-14-38R) dated September 28, 1938,* held that workers on a dry dock floating on the navigable waters of the United States were covered by the State law which contained no reference whatsoever to maritime employment either in the positive provisions dealing with coverage or in the exceptions to the meaning of the term "employment"; and the *New Jersey Board of Review in Docket No. BR-1328 dated September 16, 1940, and Docket No. BR-1338 dated September 30, 1940,* held that sound fishermen were covered by the State law. These decisions, among others, evidence a view with respect to the construction of State unemployment compensation laws contrary to that expressed by the petitioners and demonstrate an understanding that the unemployment laws are applicable to certain types of maritime work notwithstanding the absence of any positive provision referring to services of that nature.

VI.

EMPLOYEES OF DREDGING CONCERNS DO NOT COME WITHIN THE EXEMPTION PROVISIONS OF UNEMPLOYMENT INSURANCE STATUTES EXEMPTING OFFICERS AND MEMBERS OF THE CREW OF A VESSEL OPERATING ON PUBLIC NAVIGABLE WATERS.

The petitioners cite numerous cases holding that employees engaged in dredging operations are members of the crew of the dredge used in such operations. Each case dealt with some statute which sought to bring these employees within its provisions, but the petitioners have cited none where such employees were *excluded* from the operation of a statute because they were members of the crew, and our recollection is that none of the cases involved a state tax, and certainly not an unemployment insurance tax.

The administrative departments set up by the unemployment compensation statutes of the several states have had occasion to define, in the light of such statutes, those who are officers and members of the crew of a vessel navigating the public waters, and in each of these cases, unlike the Louisiana statute, the unemployment compensation statute of that State specifically and unrestrictedly exempted from its operation officers or members of the crew of such vessels. It must here be remembered that the Louisiana statute merely exempts:

> "Service performed as an officer or member of the crew of a vessel on the navigable waters of the

United States *customarily operating between ports in this State and ports outside this state.*" (Emphasis ours.) Sec. 18 (g) (6) (e) of Act 97 of 1936, as amended.

Thus, OREGON by decision of its referee January 25, 1940, No. 40-RA-16, decided that a craneman on a vessel lying in navigable waters whose service was in connection with excavating a channel and mooring basin for a permanent berth of a battleship, but whose general employment and activities do not have any direct relation to commerce or navigation was not a member of a crew. SOUTH CAROLINA'S opinion of the Attorney General dated October 12, 1939, entitled Legal Opinion No. 100, held barge captains on non-self propelled barges whose work is of a nature unassociated with the operation and movement of a vessel from point to point as an agency of transportation are in "subject employment" (did not come within the exemption definition of an officer or member of a crew) even though he may have incidentally and occasionally been connected with activities usually associated with those performed by a member of a crew. CALIFORNIA'S Division of Employment Commission in an opinion entitled Commission No. 94, on December 2, 1939, declared that a claimant who operated a pneumatic pump on a non-motive power barge located on navigable waters for the purpose of reclaiming oyster shells was not an officer or member of the crew of a vessel. In a decision of the appeal tribunal of the State of IOWA, dated April 1, 1940, entitled No. 40 A-894-CM, it was held that services as a mat weaver performed on barges along the shores of a river were not in exempt employment. The appeals tribunal of KANSAS on March 19, 1940, in an opinion en-

titled Appeal No. 101, declared that services upon Matt barges and rock barges used in river improvement work were not in exempt employment. The Board of Review of the State of NEW JERSEY, Docket No. BR-1994, on April 3, 1940, officially declared that a person in charge of a fishing boat operating in territorial waters of the United States should be held as not exempt as maritime employment when he was not required to be a seaman in order to operate the boat. The appeals tribunal of the state of WEST VIRGINIA on February 8, 1940, No. AT 999, held that a *pumper, fireman, two deck hands and engineer employed on a non-motive power dredge engaged in taking sand and gravel out of a river and not for transportation of either passengers or freight were not officers or members of the crew of a vessel on the navigable waters of the United States.* FLORIDA'S Decision of Appeal Tribunal dated June 16, 1939, Appeal Decision No. 38, in declaring services of certain workers on a canal dredge to be in covered employment stated that workers who are engaged in dredging operations of a dredge whether it be from the bottom of a river channel or not, are not members of the crew.

In the case of *Puget Sound Bridge and Dredging Co. v. State Unemployment Compensation Commission, et al.*, decided by the Circuit Court of Oregon, Fourth Judicial District, Department No. 2, on October 31, 1940 the defendant-claimant was engaged in work on a drill barge on the Columbia River. Section 2 (F) (4) of the Oregon Unemployment Law read as follows:

> "The term 'employment' shall not include services performed as an officer or members of the crew of a

vessel on the navigable waters of the United States." (Chapter 70 Laws of 1935 as amended.)

In order for defendant to recover it was necessary for him to show that he was not a "member of the crew" of a vessel within the act. Holding that defendant was not a member of the crew, the court declared:

> "In my opinion defendant Sedoris was not a member of the crew. His lifelong occupation had been work on pile drivers, bridges and general construction. His essential duties were in no wise related to 'navigation, operation, welfare or maintenance' of the *vessel*. He contributed nothing toward these maritime essentials. He fired boilers not for propulsion, but for the operation of drills used for dredging. True, a part of the power so generated was used in the occasional operation of winches in changing the vessel's position, the movement being about 5,500 feet in something over two years. A like use was available for pumping water, but the evidence fails to show such actual use. These matters, however, were mere incidents to the primary employment, inconsequential in extent and of little significance in determining the status of claimant as a member of the crew. This incidental and casual work has little, if any, relationship to navigation, operation, welfare or maintenance."

This district court decision was affirmed on appeal by the Supreme Court of the State of Oregon (126 P. 2d. 37), in which the Court said:

> "(12) We inquire, however, what has been the construction of the term 'crew' as declared by the federal courts? The United States Supreme Court has not determined the question. The decisions of the

various district, federal and intermediate courts of appeal are in conflict. Columbia L. Rev. Vol. 41, p. 1217; Tulane L. Rev., Vol. 15, p. 241. The interpretative decisions of federal administrative boards and commissions—which are only persuasive and not controlling—are likewise far from being in accord. In the light of such divergence of opinion, this court feels free to use its own judgment and will be guided by what it considers the better reasoned cases.

"(13) In order that the services performed by an individual upon a vessel on navigable waters of the United States be excluded from coverage under the unemployment compensation law, it must be shown that such services substantially tend to promote the welfare of the vessel as an agency of navigation. *It is not sufficient only to show that such services are incidental to navigation.* South Chicago Dock Co. v. Bassett, supra; DeWald v. Baltimore & Ohio R. Co., 4 Cir., 71 F. 2d 810; Diomede v. Lowe, 2 Cir., 87 F. 2d 296; Moore Dry Dock Co. v. Pillsbury, 9 Cir., 100 F. 2d 245; Hawn v. American S. S. Co., 2 Cir., 107 F. 2d 999; Shore Fishery v. Board of Review of U. E. Comm., 127 N. J. L. 87, 21 A. 2d 634, 636; The Bound Brook, D. C., 146 F. 160; The Buena Ventura, D. C., 243 F. 797. See well-considered opinion of General Counsel for Unemployment Commission of South Carolina, State Series, Vol. 2, No. 1, U. C. I. S.—1002 S. C. (Emphasis ours.)

"We are not unmindful that the United States Supreme Court in South Chicago Dock Co. v. Bassett, supra, decided February 26, 1940, had under consideration the Longshoremen's and Harbor Workers' Act, 33 U. S. C. A. §901 et seq., and not an unemployment compensation act, but its discussion of the ex-

emption clause with reference to 'master or member of a crew of any vessel' in the act is nevertheless illuminating, even though difficult to reconcile with what the court said concerning the term 'seamen' in Ellis v. United States, 206 U. S. 246, 27 S. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589, with four justices dissenting. In the Bassett case, the court, in holding that the employee injured was not a member of a 'crew', quoted with approval from The Bound Brook, supra, wherein the term was thus defined:

> " 'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board.'

"The court also quoted from The Buena Ventura, supra, wherein it was said in substance that one who served the ship 'in her navigation' was a member of the 'crew'.

"None of the above cited cases, excepting that of Shore Fishery Co. v. Board of Review of U. E. Comp. Comm., supra, involve construction of unemployment compensation acts and are, therefore, not authorities on the precise question under consideration, but the same may be said concerning Saylor v. Taylor, supra; Maryland Cas. Co. v. Lawson, 5 Cir., 94 F. 2d 190; Kibadeaux v. Standard Dredging Co., 5 Cir., 81 F. 2d 670, cited by appellant."

It is contended that the decision in the case of *Gale v. Union Bag & Paper Corporation*, 116 F. 2d 22, cannot be reconciled with the ruling of the Court in the *Puget Sound Bridge* case. We think that the *Gale* case is

distinguishable from that case and also, of course, from the case at bar. The *Gale* case arose under the Fair Labor Standards Act of 1938 which exempted "seamen". Neither the Longshoremen's and Harbor Workers' Act nor the Louisiana Unemployment Insurance Act exempt seamen. Your Honors said:

> "The master or a member of a crew of any vessel is excluded from the provisions of the act (Longshoremen's and Harbor Workers' Act); 'seamen' are not. In each case the decision turned on the point that the employee was neither the master nor the member of a crew of a vessel.
>
> "* * * It is plain that it was not the intention of Congress to exclude a person who might be considered a seaman within the ordinary meaning of the word from the benefits of the act unless he were the master or a member of a crew of a vessel."

The Court properly concluded that, inasmuch as the *Longshoremen's and Harbor Workers'* cases involved an exemption which differed in language and scope from that set out in the Fair Labor Standards Act, the cases construing the exemption in the Longshoremen's and Harbor Workers' Act would have no application to the case before it. Similarly it can be argued by respondent that, inasmuch as the *Gale* case concerned a statute exempting "seamen" and not "officers or members of a crew of a vessel on the navigable waters of the United States" etc., the determination of the scope of the exemption in the *Gale* case is irrelevant to any determination of the scope of the exemption in the Louisiana Unemployment Compensation Law. Furthermore, it should be observed that the opinion in the *Gale* case rests heavily upon the legislative intention in so far as the restriction of hours of work provided

for in the Fair Labor Standards Act is concerned. The Court points out that to restrict the work of individuals performing services on barges to 40 hours per week "would greatly interfere with the operation of such means of transportation." It indicates that as a consequence of the application of the hours provision in the Fair Labor Standards Law to the services there involved "probably barge tenders would not be employed at all." Thus, the Court had in mind administrative considerations bearing upon the interpretation of the Fair Labor Standards Act which are wholly irrelevant to a construction of the scope of the coverage of the Louisiana Unemployment Insurance Law.

All of the above mentioned rulings cited by respondent have been made under the unemployment compensation statutes of states possessing a provision for the exemption from coverage of officers or members of the crew of vessels operating on the navigable waters of the United States. As can readily be observed, notwithstanding such exemptions, employees of dredge boats and similar watercraft have been held to be subject employees under the unemployment insurance statutes of these states. If employees of dredge boats are not considered exempt in states having a provision in their unemployment insurance statutes exempting officers and members of the crew of a vessel, *a fortiori*, employees of dredge boats are subject to the Louisiana Unemployment Compensation Act, which only exempts officers and members of the crew of a vessel which customarily operates between ports in and outside the jurisdiction of the State of Louisiana. Since petitioners have admitted that their dredges do not customarily so operate, under the decisions of the states above

enumerated their employees certainly are subject employees under the Louisiana Unemployment Compensation Law which contains no exemption in their favor. On the basis of the above stated authority, this would be true even if the Louisiana statute would not include the phrase "customarily operating between ports in this state and ports outside this state."

It appears that whenever courts have been confronted with the proposition of whether or not to exempt a seaman from the operation of a statute, they always narrow the definition so as to only allow those persons generally considered as seafaring men to become excluded from its operation. Consistent with this declaration is the case of *Moore Drydock Company v. Pillsbury, 100 Fed. (2d) 245.* We quote from page 246 of that case:

> "Although the courts thus far have not formulated a precise statement from which it can at once be determined just when an employee is a member of a crew and when he is a harbor worker, they are in agreement upon the principle that Congress, in the enactment of a longshoremen and harbor workers' compensation act, intended to except from the operation thereof only those employees ordinarily and generally considered as seafaring men, leaving that case to be determined by the circumstances of each case."

It is needless to cite authority in support of the universal rule that exemptions from taxation are strictly construed against those claiming the exemption. If the petitioners are entitled to any exemption from the payment of the tax imposed by the Louisiana statute, which we deny, it is up to them to show clearly the extent of their rights in that

respect. They have chosen to assume that the services rendered by all of their employees come within the exemption they claim and they, not the respondent, bear the burden of clear and positive proof in that respect.

If the Court agrees with our view that the right to impose excise taxes inheres in a state and was reserved to the several states by the Constitution, subject only to such limitations as the 14th Amendment provides, then the statute here involved must be upheld. If, on the other hand, that view does not prevail, we think we have shown that the statute in question in no way affects any maritime contract or enlarges or limits any rights enjoyed by the parties to any such contract, or is in any way prejudicial to the general maritime law, or in any way interferes with the proper harmony and uniformity of that law. The acceptance of that view alone would reject the only argument the petitioners make and would compel a decision upholding the constitutionality of the statute and affirming the decision of the District Court and that of the Circuit Court of Appeals.

Respectfully submitted,

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Of Counsel.

April, 1943.

APPENDIX.

ACTS

STATE OF LOUISIANA

REGULAR SESSION

1938.

Act No. 330.

House Bill No. 568. By Mr. Sevier.

AN ACT

To amend and re-enact Act 16 of the Second Extraordinary Session of 1934 (amended by Act 23 of the Second Extraordinary Session of 1935) entitled, as amended, "An Act to carry into effect Section 18, Article X of the Constitution of Louisiana, and to provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him."

Section 1. Be it enacted by the Legislature of Louisiana, That Act 16 of the Second Extraordinary Session of the Legislature of 1934, (amended by Act 23 of the Second Extraordinary Session of 1935) be amended and re-enacted so as to read as follows:

AN ACT

To carry into effect Section 18, Article X of the Constitution of Louisiana, and to provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him.

Section 1. Be it enacted by the Legislature of Louisiana, That no court of this State shall issue any process whatsoever to restrain the collection of any tax imposed by the State of Louisiana, or by any political subdivision of the State of Louisiana, under authority granted to it by the Legislature or by the Constitution.

Section 2. (a) A right of action is hereby created to afford a remedy at law for any person aggrieved by the provisions of this Act; and in case of any such person resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such person shall pay the amount found due by the officer designated by law for the collection of the said tax and shall give the officer notice, at the time, of his intention to file suit for recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the officer designated by law for the collection of the tax for a period of thirty (30) days; and if suit be filed within such time for the recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. If the person prevails, the officer designated by law for the collection of the tax shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the officer designated by law for the collection of said tax to the date of refund.

(b) This Section shall afford a legal remedy and right of action in any State or federal court having jurisdiction of the parties and subject-matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Act, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such actions, service of process upon the officer designated by law for the collection of the said tax shall be sufficient

service, and he shall be the sole necessary, and proper party defendant in any such suit.

(c) This Section shall be construed to provide a legal remedy in the State or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States; provided, that upon request of a person and upon proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, the said person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the officer designated by law for the collection of the said tax until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

Section 3. This Act shall not be held to repeal any law providing that taxpayers shall have the right of testing the correctness of their assessments before the courts of the State, except insofar as such laws or parts of laws may be in conflict with this Act; nor shall this Act be held to repeal or affect any right under Act 16 of the Second Extraordinary Session of 1934, nor Act 23 of the Second Extraordinary Session of 1935.

Approved by the Governor: July 6, 1938.

A true Copy:
E. A. CONWAY,
Secretary of State.